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Supreme Court, U.S.

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In The
Supreme Court of the United States
October Term, 1990

BUSINESS GUIDES, INC.,

Petitioner,

vs.

CHROMATIC COMMUNICATIONS ENTERPRISES,
INC. and MICHAEL SHIPP,

Respondents.

On Writ Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit

REPLY BRIEF OF PETITIONER ON THE MERITS

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26

TABLE OF CONTENTS

	Page
I. INTRODUCTION.....	1
II. ARGUMENT.....	3
A. RULE 11 DOES NOT IMPOSE DIRECT OBLIGATIONS ON REPRESENTED PARTIES	3
B. RESPONDENTS' REFERENCE TO OTHER RULES DOES NOT SUPPORT THEIR POSITION.....	13
C. APPLICATION OF A GOOD FAITH STANDARD TO REPRESENTED PARTIES IS CONSISTENT WITH SOUND POLICY CONSIDERATIONS	15
D. RULE 11, AS INTERPRETED BY THE COURT BELOW, VIOLATES THE RULES ENABLING ACT.....	19
III. CONCLUSION	20

TABLE OF AUTHORITIES

Page

CASES

<i>Alyeska Pipeline Serv. Co. v. Wilderness Soc'y</i> , 421 U.S. 240 (1975).....	19
<i>Apex Oil Co. v. Belcher Co. of New York, Inc.</i> , 855 F.2d 1009 (2d Cir. 1988).....	8
<i>Browning Debenture Holders Comm. v. DASA Corp.</i> , 560 F.2d 1078 (2d Cir. 1977).....	7
<i>Calloway v. Marvel Entertainment Group</i> , 854 F.2d 1452 (2d Cir. 1988), <i>rev'd in part on other grounds sub nom., Pavelic & LeFlore v. Marvel Entertainment Group</i> , ___ U.S. ___, 110 S. Ct. 456 (1989).....	6, 8, 12, 16
<i>NASCO, Inc. v. Calcasieu Television and Radio, Inc.</i> , 894 F.2d 696 (5th Cir.), <i>cert. granted sub nom., Chambers v. NASCO, Inc.</i> , 1990 WL 119996 (Oct. 1, 1990).....	20
<i>Clark v. Uebersee Finanz-Korporation, A.G.</i> , 332 U.S. 480 (1947).....	6
<i>Cooter & Gell v. Hartmarx Corp.</i> , ___ U.S. ___, 110 S. Ct. 2447 (1990).....	2, 8, 9, 18
<i>Cross & Cross Properties v. Everett Allied Co.</i> , 886 F.2d 497 (2d Cir. 1989).....	12
<i>Greenberg v. Hilton Int'l Co.</i> , 870 F.2d 926 (2d Cir. 1989).....	12
<i>Hollinger v. Titan Capital Corp.</i> , 190 Daily Journal D.A.R. 11003 (9th Cir. 1990).....	11
<i>Link v. Wabash R.R.</i> , 370 U.S. 626 (1962).....	17
<i>Palmer v. Hoffman</i> , 318 U.S. 109 (1943).....	10
<i>Philbrook v. Glodgett</i> , 421 U.S. 707 (1975).....	7
<i>Roadway Express, Inc. v. Piper</i> , 447 U.S. 752 (1980)....	20

TABLE OF AUTHORITIES – Continued

Page

<i>Theard v. United States</i> , 354 U.S. 278 (1957).....	20
<i>Thomas v. Capital Security Servs., Inc.</i> , 836 F.2d 866 (5th Cir. 1988).....	4
<i>United States v. Clark</i> , 445 U.S. 23 (1980).....	20
CODES AND RULES	
Judiciary and Judicial Procedure, 28 U.S.C.A. § 2072 (West Supp. 1990).....	20
Federal Rules of Civil Procedure	
Rule 11.....	<i>passim</i>
Rule 16.....	14
Rule 16(f).....	14
Rule 26.....	8, 14
Rule 26(g).....	8, 14
Rule 33.....	5
Rule 33(a).....	14
Rule 36.....	5
Rule 37.....	14, 15
Rule 37(b)(2)(A).....	15
Rule 37(d).....	14
Rule 56.....	15
Rule 56(g).....	5, 6, 15
Federal Rules of Civil Procedure Rule 37 Advisory Committee Notes.....	14

TABLE OF AUTHORITIES – Continued

Page

Federal Rules of Civil Procedure:

Amendments to Rules,

97 F.R.D. 165 (1983) 6, 7, 8, 10, 14

Federal Rules of Evidence

Rule 803(b) 10

OTHER AUTHORITIES

American Judicature Society, *Rule 11 in Transition, The Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11* (Burbank, Reporter 1989) 16, 17, 18, 19Burbank, *Hold the Corks: A Comment on Paul Carrington's "Substance" and "Procedure" in the Rules Enabling Act*, 1989 Duke L.J. 1012 20G. Calabresi, *The Costs of Accidents* (1970) 9Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Call for Written Comments on Rule 11 of the Federal Rules of Civil Procedure and Related Rules* (August, 1990) 18Marcus, *Reducing Court Costs and Delay: The Potential Impact of the Proposed Amendments to the Federal Rules of Civil Procedure*, 65 Judicature 363 (1983) 11Memorandum from Walter F. Mansfield to Members of the Advisory Committee on Civil Rules, *Analysis of Comments Re: Committee Proposed Amendments to Rules 7 and 11* (dated December 21, 1981) 17Miller, *The New Certification Standard Under Rule 11*, 130 F.R.D. 479 (1990) 11, 13, 16R. Posner, *Economic Analysis of Law* (1986) 9

TABLE OF AUTHORITIES – Continued

Page

Rothschild, *Rule 11: Stop, Think & Investigate*, 11 Litigation 13 (Winter 1985) 11Sutherland, *Statutory Construction* § 47.16 (4th ed. 1984) 7Wright & Miller, *Federal Practice and Procedure*, Civil 2d § 1332 (1990) 20

I. INTRODUCTION

Respondents' brief simply highlights the issue before the Court: whether represented parties may only be sanctioned under Rule 11 when they knowingly (or recklessly) present incorrect information to the court or otherwise act in bad faith. Respondents would prefer a different case – one in which the trial court held that Business Guides, in fact, acted in bad faith. But despite respondents' attempt to characterize Business Guides' conduct as a pernicious effort to drive a small competitor out of business, the court expressly found to the contrary. (Pet. App. 48a, 53a) However mistaken Business Guides may have been in its belief that respondents copied its directory, the Chief Magistrate and district court found that Business Guides' employees – in particular Victoria Burdick and Michael Lambe – held that belief in good faith and acted accordingly.¹ Respondents' effort to sustain the result

¹ As below, respondents argue that no good faith finding was actually made. According to respondents, "the Magistrate merely concluded that he no longer believed that appellant had engaged in an intentional cover up." (Brief of Respondents on the Merits (hereafter "R.B.") at 7) Elsewhere in their brief, respondents imply, with no support from the record, that Business Guides brought this action to drive respondents' lower-priced product out of the market. However, a careful inspection of the Magistrate's revised report reveals that, upon reconsideration, the Magistrate concluded that Business Guides had at all times acted in good faith, though – in his view – carelessly:

I agree with Business Guides that the evidence not previously before me is "absolutely fundamental" to an understanding of what transpired in preparing the TRO application. It is only now, after the many months this controversy has been pending, that I have been presented with a reasonable explanation as to how inaccurate information was originally presented to the court. I no longer believe either Business Guides or its counsel, Finley, Kumble, took part in any intentional misrepresentation or cover-up."

(Pet. App. 48a) (emphasis added) The Magistrate further stated: "I no longer believe Business Guides' actions were 'interposed for any

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below by changing the factual premise upon which it was based does not advance the resolution of the Rule 11 issue presented here.

Aside from respondents' attempt to recharacterize the record, their brief has remarkably little to say and what it does say, we suggest, is demonstrably wrong. Respondents argue principally from a supposed reading of the "plain language" of the Rule – but their reading is plainly inaccurate. See pp. 3-8, *infra*. Their attempt to deal with the policy arguments advanced by petitioner amounts to little more than the accurate but analytically unhelpful observation that the purpose of Rule 11 is deterrence (see pp. 9-13, *infra*), plus an unsupported claim that making represented parties responsible only for intentional or reckless failures somehow will complicate Rule 11 hearings (see pp. 15-19, *infra*). Neither of those arguments, nor any other matter raised by respondents, should cause this Court to apply Rule 11 to represented parties in the broad fashion endorsed by the Ninth Circuit in its opinion below. Rather, restricting application of the Rule principally to counsel is consistent with the purpose of the Rule and the respective roles of client and counsel in our legal system.²

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improper purpose." (Pet. App. 53a) (emphasis added) In sum, the Magistrate's revised report is not limited to a finding that there was no "intentional cover-up," as respondents contend, but also includes findings that Business Guides did not engage in any effort to "misrepresent" and did not act with an improper purpose. The district judge adopted those findings (Pet. App. 35a-46a) and the Ninth Circuit acknowledged them in its decision (Pet. App. 6a-13a). The Rule 11 findings of a district court are reviewed under an abuse of discretion standard. *Cooter & Gell v. Hartmarx Corp.*, ___ U.S. ___, 110 S. Ct. 2447, 2461 (1990).

² While many of the "facts" highlighted by respondents are immaterial in light of the trial court's findings, Business Guides is puzzled by respondents' suggestion that Business Guides has presented "substantial mischaracterizations of the record." (R.B. 2 n.1) To the contrary, it is respondents who have asserted facts nowhere to be found in the record

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II. ARGUMENT

A. RULE 11 DOES NOT IMPOSE DIRECT OBLIGATIONS ON REPRESENTED PARTIES

Petitioner's opening brief explained why the policies of Rule 11 are not well served by employing the Rule to punish

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below. *First*, contrary to respondents' assertions, no evidence in the record suggests that Business Guides acted in order to drive a "mom and pop" competitor out of business. Indeed, the evidence in the record suggests that Business Guides did not act precipitously upon discovering that respondents had published a directory which appeared to contain copied material, but instead waited over a year to verify that respondents' directory contained, according to Business Guides' belief, other copied business listings. (J.A. 185-86) The Magistrate expressly found that Business Guides did not act with any improper purpose in filing and prosecuting the action below, and acted at all times with a genuine belief that it was dealing with copied material. (Pet. App. 48a, 53a) Again, the district court adopted those findings. (Pet. App. 35a-46a)

Second, there is no evidence in the record that Mr. Lambe had any role in preparing the 1984 master seed list or that he was ever made aware of respondents' offer to allow the inspection of respondents' business records. Whether Mr. Lambe, as director of research for several of Lebhar-Friedman's numerous publications, was a "mid-level" or (as respondents contend) a "senior" employee, the uncontroverted facts establish – and the district court found – that he acted with the sincere belief that respondents were guilty of copying when he signed his declaration. *Id.*

Third, respondents' suggestion that Richard Rossini's declaration was a "blatant lie" (R.B. 19 n. 10) is not only offensive, but insupportable. It is undisputed that the "NFR Computer Room" seed was wholly fictitious (the name being comprised of the initials of Mr. Rossini's daughter) but, nonetheless, appeared in respondents' directory. As of the time Mr. Rossini filed his declaration – and to this day – Business Guides has been allowed no discovery as to how its Type A seed found its way into respondents' directory. Absent such discovery, neither Business Guides nor, we submit, the district court was in a position to know whether respondents' purported explanation for the appearance of the NFR seed is

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represented parties for unintended and unknowing litigation mistakes. (See Brief of Petitioners on the Merits (hereafter "P.B.") at 21-39) Respondents largely decline to take issue with that argument. Instead, they argue that Business Guides' position is foreclosed by the "plain language" of the Rule. (R.B. 12) According to respondents, Rule 11 simply makes no "provision for a separate standard by which to judge a represented party's conduct." (R.B. 14) Thus, say respondents, what Business Guides wants is for this Court "to rewrite Rule 11" to accommodate its view of how the Rule ought to operate. (R.B. 14)

But respondents' "plain language" argument is, itself, plainly wrong. Contrary to what respondents assert, the language of the Rule (a) places *no direct obligation* of any kind on a represented party and (b) establishes *no standard* for determining when such a party may be sanctioned.

In pertinent part, Rule 11 states as follows:

[1] Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. [2] A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. . . . [3] The signature of an attorney or party constitutes a certificate by

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well-founded. The fact that Business Guides was not able – absent such discovery – to respond to respondents' assertions about that matter says no more than that it remains in dispute. One thing is clear, however: Rule 11 was never intended to truncate the operation of the litigation process by allowing the peremptory dismissal of claims. Cf. *Thomas v. Capital Security Services, Inc.*, 836 F.2d 866, 878 (5th Cir. 1988).

Fourth, respondents' can only attempt to dismiss the appearance in their directories of the "Computers & Applications" Type B seed from the 1986 master seed list by arguing, again without any support from the record, that they used the "most common spelling" ("Choy"), of a name correctly spelled "Choi." Business Guides submits that that issue, too, should have been left to a jury or to the court under Rule 56, after an opportunity for appropriate discovery. *Id.*

the signer that the signer has read the pleading, motion, or other paper, that to the best of *the signer's* knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. [4] If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleadings, motion, or other paper, including a reasonable attorney's fee.

(emphasis added).

Unlike respondents, we read that "plain language" to say the following: According to Sentence 1, all pleadings, motions and other papers of a represented party must be "signed by at least one attorney of record." No provision is made requiring the represented party to sign such papers and that is virtually never done except in the case of affidavits (which are dealt with specifically by Rule 56(g), see p. 15 & n. 3, *infra*) or substantive discovery responses (see, e.g., Rules 33 and 36; see pp. 13-15, *infra*). In fact, Rule 11 itself expressly provides that "[e]xcept when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit." Thus, the only time a party "signs" pleadings or other filings is when the party is appearing *in propria persona* – a circumstance expressly dealt with by Sentence 2 of the Rule.

Sentences 3 and 4 are the operative provisions of Rule 11 applied below. They provide that "the signature" on a paper constitutes a certification "by the signer" as to certain matters of fact and law and as to the lack of any "improper purpose" in filing the paper. That signature ordinarily will be that of an attorney (per Sentence 1) but it may on occasion be that of a

party, where that party appears *pro se* (the circumstance specified in Sentence 2). Finally, Sentence 4 tells us that if a paper "is signed" in violation of the Rule sanctions may be imposed upon "the person who signed it" or "a represented party" or "both."

Thus, contrary to respondents' reading of the alleged "plain language" of the Rule, the only obligations Rule 11 imposes are upon the individual attorney who signs the paper in question (*see Pavelic & LeFlore v. Marvel Entertainment Group*, ___ U.S. ___, 110 S. Ct. 456 (1989)), or upon a *pro se* party. It is "the signer" who, by "signature," certifies that he or she has done or refrained from doing the various things specified in the Rule. (Sentence 3) Concededly, if that certificate is incorrect (*i.e.*, if the paper is "signed in violation" of the Rule), that fact may subject not only "the person who signed" it, but the signer's client to sanctions. (Sentence 4) However, again contrary to respondents' arguments, the Rule does not define any standard for determining when the client, in addition to or in lieu of his or her counsel, may be sanctioned. Rather, that is the issue to be decided here.

Respondents' attempt to read the term "party" in Sentence 3 of the Rule as if it referred to *represented* parties cannot be squared with the remainder of the sentence which makes "the signature" on a pleading or other paper the operative event. That is particularly evident since, as noted above, represented parties virtually never sign pleadings or motions.³ *See Clark v. Uebersee Finanz-Korporation, A.G.*, 332 U.S.

³ Insofar as "other papers" are concerned, they are signed by represented parties only in the case of certain discovery responses or affidavits. The former are not only dealt with specifically by other rules, but the Advisory Committee expressly noted that Rule 11 as revised in 1983 was not intended to apply to those responses: "Although the encompassing reference to 'other papers' in new Rule 11 literally includes discovery papers, the certification requirement in that context is governed by new Rule 26(g)." *Amendments to the Federal Rule of Civil Procedure*, 97 F.R.D. 165, 201 (1983). Similarly, Rule 56(g) provides that summary judgment affidavits are subject to sanction only when submitted

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480, 488 (1947) ("Our task is to give [a statute] the most harmonious, comprehensive meaning possible."); *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975).

Similarly, respondents' attempt to find support for their "plain language" argument in the advisory committee notes similarly runs aground on the plain language of those notes. They expressly point out that "it is the attorney whose signature violates the rule," although "it may be appropriate under the circumstances of the case to impose a sanction on the client. *See Browning Debenture Holders' Committee v. DASA Corp.*, *supra*."⁴ That portion of the notes not only

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in bad faith. If the drafters of revised Rule 11 really contemplated creating an additional and – in respondents' view – far more expansive basis for sanctioning incorrect affidavits, it is hard to believe they would have expressed it in such an oblique fashion. *See, e.g.*, Sutherland, *Statutory Construction* § 47.16 (4th Ed. 1984) (as a matter of statutory construction, the specific controls the general).

⁴ 97 F.R.D. at 200. The Ninth Circuit's effort to distinguish the committee's citation to *Browning Debenture Holders' Committee v. DASA Corp.*, 560 F.2d 1078 (2d Cir. 1977) is, at best, somewhat facile. While it surely is true that most pre-1983 cases imposed sanctions only in the case of bad faith, *Browning* expressly held that, in the case of parties, sanctions are available only where the particular party is responsible for, or knew of, the wrongful conduct:

[An attorney's] procedural bad faith, moreover, may not automatically be visited upon the other plaintiffs personally. Bad faith is personal, *see Hall v. Cole*, 412 U.S. 1, 5, 93 S.Ct. 1943, 36 L.Ed.2d 702 (1973). Since an award of costs or attorneys' fees based on bad faith must likewise be personal, such an award may be assessed against plaintiffs . . . only after reconsideration and such hearing as the district court finds necessary, that they personally were aware of or otherwise responsible for the procedural action instituted in bad faith. Otherwise, such awards may be assessed only against [the attorney] under 28 U.S.C. § 1927.

Browning, 560 F.2d at 1089.

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articulates the correct reading of the Rule, as discussed above, but flags the critical question which respondents have so neatly attempted to beg, namely: What *are* "the circumstances" under which it is "appropriate" to sanction a client under Rule 11?⁵

That question, we submit, cannot be answered by some contorted reading of the Rule since it is, in fact, utterly silent as to when a party may be sanctioned for its attorney's improper certification. Thus, courts must instead look to the

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The committee could have chosen any of a number of pre-1983 Rule 11 cases to describe when parties may be sanctioned, but instead chose a case carefully distinguishing between culpable (personal bad faith) and non-culpable (negligence or inadvertent participation in a frivolous action) conduct. That choice cannot be so lightly dismissed.

⁵ In similar fashion, the advisory committee notes to amended Rule 26(g) – a rule which substantially reiterates the relevant language of Rule 11 – notes that the signature and certification requirements for both rules apply only to attorneys or to parties electing to act as their own counsel:

If primary responsibility for conducting discovery is to continue to rest with the litigants, they must be obliged to act responsibly and avoid abuse. With this in mind, Rule 26(g), which parallels the amendments to Rule 11, requires an attorney or unrepresented party to sign each discovery request, response, or objection.

97 F.R.D. at 218-219 (emphasis added); see also, *Apex Oil Co. v. Belcher Co. of New York, Inc.*, 855 F.2d 1009, 1014-15 (2nd Cir. 1988).

This Court has recognized the same point as well, albeit in other contexts. See *Cooter & Gell v. Hartmarx Corp.*, ___ U.S. ___, 110 S. Ct. 2447, 2454 (1990) ("Rule 11 imposes a duty on attorneys to certify that they have conducted a reasonable inquiry and have determined that any papers filed with the court are well-grounded in fact, legally tenable, and 'not interposed for any improper purpose.' " (emphasis added)). Cf. *Pavelic & LeFlore v. Marvel Entertainment Group*, 110 S. Ct. 456 (1989) (signature and certification requirements pertain to individual attorneys, not their firms).

policies underlying the Rule. And, as pointed out in petitioner's opening brief, furthering those policies need not require treating clients and attorneys in the same fashion. See P.B. at 22-36.

Respondents argue that the central policy of Rule 11 is deterrence, an assertion unquestionably supported by this Court's recent opinion in *Cooter & Gell*. Yet, again, that fact no more provides an answer to the question before this Court than does respondents' reference to the Rule's "plain language." To say that Rule 11 seeks deterrence does not indicate what it seeks to deter a *client* from doing; nor, assuming that question has been answered, does it indicate whether applying an "objective" standard would be the most efficient way to achieve such deterrence – recognizing, as tort law generally does, that there are substantial social costs to over-deterrence.⁶

As we have argued previously, the duty of keeping the litigation vehicle on a true course is properly imposed upon counsel, who are at least ostensibly trained to direct and maneuver it. From that fact, it follows that it is counsel who should be expected to conduct whatever investigations into matters of fact and law are appropriate. That is exactly what the text of the Rule provides (except in the case of *pro se* parties who choose, for whatever reason, to act as their own counsel). Surely counsel will seek information from their clients in performing such investigations, at least as to matters of fact, which often are known only to the client.⁷

⁶ See, e.g., R. Posner, *Economic Analysis of Law*, 147-51 (1986); see generally, G. Calabresi, *The Costs of Accidents* (1970).

⁷ That allocation of responsibilities is made explicit by the advisory committee in discussing the substantially identical certification requirements of Rule 26:

The duty to make a "reasonable inquiry" is satisfied if the investigation undertaken by the attorney and the conclusions drawn therefrom are reasonable under the circumstances. . . . In making the inquiry, the attorney may rely on assertions by

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However, so long as the client is not improperly motivated and attempts to provide a full and truthful rendering of the facts as it believes them to be, it is hard to see what useful purpose is served by holding the client responsible for not thinking more correctly or fully about the possible flaws or holes in its view of the relevant events. After all, a client that is acting in good faith and not for an improper purpose wants to win (or, as a defendant, not lose) its case. Also, just as the advisory committee has aptly cautioned against invoking the perfect clarity of hindsight (*see* 97 F.R.D. at 199), deterrence is only usefully provided when the correct course of conduct can be discerned *ex ante*. Yet most often – as plainly was the case here – the only failure by the client is non-awareness, for which the only cure is to “be smarter.” That may well be an appropriate command to counsel: An attorney who is incapable of determining what is a reasonable investigation has no business serving as counsel in the federal courts, however well intentioned he or she may be. The same is not true of parties. “Be smart” is neither a useful direction to, nor an appropriate standard for, punishing a well-meaning client.⁸

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the client and on communications with other counsel in the case as long as that reliance is appropriate under the circumstances.

97 F.R.D. at 219 (emphasis added).

⁸ Thus, in terms of the facts of this case, it is no answer to our arguments to note that it took the district court’s law clerk only about an hour to check the accuracy of Business Guides’ seeds. The issue, rather, is what would cause a party to question their accuracy in the first place when it has been given no reason to doubt such accuracy. That indisputably was the case prior to the time the complaint was filed. As pointed out in petitioner’s opening brief, the law as well as the world of commerce presumes the regularity of business records. *See* Fed. R. Evid. 803(b); *Palmer v. Hoffman*, 318 U.S. 109, 112 (1943).

So far as Mr. Lambe’s supplemental declaration is concerned, the facts illustrate precisely the point made in text. Assume, as the Magistrate

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The situation is very different when a client *intends* to misuse the litigation process for improper purposes, or brings litigation with no concern for its merit. Cf. *Hollinger v. Titan Capital Corp.*, 190 Daily Journal D.A.R. 11003 (9th Cir. 1990) (en banc) (holding that recklessness meets the scienter requirement for a claim under Rule 10b-5 when the danger of misleading was “so obvious that the actor must have been aware of it.”) That – and, we submit, that alone – is “the circumstance” in which it is “appropriate” to hold the client accountable. Any other standard will deter only through fear of being wrong and, thus, deter too much. *See* P.B. 21-36. Put another way, the mandate to “stop, think and investigate,” Rothschild, *Rule 11: Stop, Think & Investigate*, 11 Litigation 13 (Winter 1985), should not be transformed in the case of a client into, simply, “stop.”

Because lawyers are the appropriate gatekeepers of our courts (*see* P.B. 23-24 & n.25), amended Rule 11 rightly demands that they be held to an appropriate standard of professionalism. Miller, *The New Certification Standard Under Rule 11*, 130 F.R.D. 479, 481 (1990) (“The amended rule emphasizes the responsibilities of the attorney and reinforces those obligations by encouraging courts to impose sanctions.”); *see also* Rothschild, 11 Litigation at p. 54; Marcus, *Reducing Court Costs and Delay: The Potential Impact of the Proposed Amendments to the Federal Rules of*

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found, that it was unreasonable for Mr. Lambe to have assumed the validity of Business Guides’ other seeds once his self-generated research had called some of them into question. If that is true, what good is it to tell him “you must be careful?” Or “more careful?” Rightly or wrongly, Mr. Lambe thought that he *was* being careful. It just did not occur to him (or, we would note, to his counsel) to question the other seeds. That being the case, how will imposing sanctions for such assumed incompetence make the next incompetent client less so when it is his or her opportunity to make a mistake? That is why we have lawyers: To recognize that the thirteenth chime of the clock is not only inherently suspect itself, but that it calls into question the twelve that have preceded it.

Civil Procedure, 65 Judicature 363 (1983). For represented parties, on the other hand, courts should only demand that they reveal all pertinent facts (as they in good faith believe them to be) to their counsel, act in accordance with the advice of such counsel and otherwise proceed in good faith and for a proper purpose.⁹

The Second Circuit has carefully drawn this distinction, holding that clients should be sanctioned only for pleadings signed by their attorneys when the client knowingly misleads counsel or engages in other wrongful conduct. *Calloway v. Marvel Entertainment Group*, 854 F.2d 1452, 1474 (2d Cir. 1988), *rev'd in part on other grounds sub nom., Pavelic & LeFlore v. Marvel Entertainment Group*, ___ U.S. ___, 110 S. Ct. 456 (1989). See also, *Greenberg v. Hilton Int'l Co.*, 870 F.2d 926, 939 (2d Cir. 1989); *Cross & Cross Properties v. Everett Allied Co.*, 886 F.2d 497, 505 (2d Cir. 1989). Business Guides submits that the reasoning of the Second Circuit is consistent with both the text of the Rule and with the policies underlying it.¹⁰ The standard set forth by that circuit should

⁹ In this context, imposing a different standard on represented parties would not render Rule 11 redundant of inherent power, as respondents suggest. (R.B. 21-22) The amended Rule would still have been necessary to heighten the standard of conduct applicable to attorneys and *pro se* litigants, which is all it does. Including represented parties among those who can be sanctioned under the Rule simply accommodates the situation where, after inquiry prompted by a Rule 11 motion or *sua sponte* consideration, the court finds that a violation was caused by the bad faith conduct of such a party. In such a case, if the lawyer was unaware of that conduct, it would be unjust to sanction him or her. If the lawyer was aware, both should be sanctioned.

¹⁰ Respondents' efforts to disparage (R.B. 25 n.12) and distinguish (R.B. 25-27) Second Circuit precedent are not helpful. The parties may argue as to the relative sophistication of the thought processes of the plaintiff in *Calloway* and Business Guides' Mr. Lambe, or as to the relative involvement of Finley, Kumble below and counsel in *Greenberg*, 870 F.2d 976, but the point of those cases remains the same: Unless

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be adopted by this Court and the contrary view of the court below rejected.¹¹

B. RESPONDENTS' REFERENCE TO OTHER RULES DOES NOT SUPPORT THEIR POSITION

Respondents also attempt to support their so-called "single standard" approach to Rule 11 by referring to other rules. See R.B. 22-23. The point is, at best, seriously overstated. In fact, to the extent that the rules permit parties to be sanctioned for failing to fulfill specific duties, the operative line of responsibility appears to be drawn at good faith, as petitioner urges should be the case here.

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represented parties knowingly present false evidence or otherwise act in bad faith, Rule 11 sanctions against the client are inappropriate.

¹¹ Even if this Court were to find the certification requirement applicable to represented parties, the result should be the same. At most, all that can be expected (if the certification requirement pertains to represented parties) is that the client conduct an inquiry which he or she genuinely believes to be reasonable. Even in the case of attorneys, one commentator (the Reporter for the Advisory Committee at the time of the 1983 amendments) has suggested that certain elements of the subjective standard remain:

Because some subjective language remains in the amended rule – the signer certifies "to the best of the signer's knowledge, information, and belief" – the amended rule might have been construed to protect attorneys who honestly reach unreasonable conclusions about the factual or legal strength of their cases. . . . [I]t is an overstatement to describe the inquiry element as purely objective because the language of the rule does contain a subjective element.

Miller, *The New Certification Standard Under Rule 11*, 130 F.R.D. 479, 485 (1990). If a subjective standard of inquiry partially survives for attorneys, surely it should survive for represented parties in the event the Rule is interpreted to impose a certification requirement upon them. Under this subjective standard, represented parties should be protected when they endeavor to ascertain the facts but "honestly reach unreasonable conclusions." *Id.*

It is, perhaps, useful to begin with the obvious. Different rules exist for different purposes and, thus, have their own respective structures, including the circumstances and nature of the punishment for failure to comply. For example, the discovery rules impose certain specific obligations directly upon clients (*e.g.*, to appear for deposition or answer interrogatories). Failure to appear at a deposition is specifically governed by Rule 37(d) which permits (but does not require) the imposition of sanctions, unless the failure (which is quite unlikely to be a result of inadvertent conduct) is "substantially justified" or there are "other circumstances" that "make an award of expenses unjust." Similarly, giving false answers to interrogatories (or at a deposition, for that matter) is punishable as perjury (*see* P.B. notes 34-36 and accompanying text) since such responses must be made "under oath." Fed. R. Civ. P. 33(a).

Rules 16 and 26, referred to by respondents (at R.B. 22-23), are more closely related in structure to Rule 11 (in fact, the operative language of Rule 26(g) is substantially identical). However, nothing in those rules suggests that negligence is a proper basis for imposing sanctions on a client under Rule 11 or Rules 16 or 26. Indeed, the advisory committee notes to the 1983 amendments to Rule 16 assert that sanctions under Rule 16(f) are intended to punish "disobedient or recalcitrant" counsel and/or clients. 97 F.R.D. at 213. Similarly, the notes to the 1983 revision of Rule 26 speak of a purpose to deter "those who might *be tempted*" to breach their discovery obligations. *Id.* at 220 (emphasis added). That language, again, suggests a concern with purposeful, rather than inadvertent, failure. *See* also note 3, *supra*.¹²

¹² Rule 37, also referenced by respondents, does permit sanctions to be imposed for a "failure" to make discovery, with questions of "wilfulness" being relevant to the "selection of sanctions, if any, to be imposed." *See*, Fed. R. Civ. P. 37 Advisory Committee Note (citing *Societe Internationale v. Rogers*, 357 U.S. 197, 208 (1958)). That fact scarcely aids

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Finally, Rule 56 – which is one rule that is directly concerned with the assertion of facts *by a party* – expressly limits the imposition of sanctions to summary judgment affidavits "presented in bad faith or solely for the purpose of delay." Fed. R. Civ. P. 56(g). That is, of course, essentially the standard advocated here by petitioner. While we, of course, acknowledge that Rule 56, too, has a specific purpose that is not identical with the purposes of Rule 11, recognition that a client's presentation of false facts may only be punished if done in bad faith or for an improper purpose is far more persuasive than the "other rules" relied upon (for the most part, mistakenly) by respondents.¹³

C. APPLICATION OF A GOOD FAITH STANDARD TO REPRESENTED PARTIES IS CONSISTENT WITH SOUND POLICY CONSIDERATIONS

Petitioner's opening brief discussed three policy considerations: achieving a proper balance between the goals of deterring undesirable conduct and chilling legitimate claims; encouraging the participation of all relevant actors in the litigation process and thereby more readily arriving at the truth; and furthering judicial economy. Each of these

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respondents' cause here. Unlike Rule 11, the type of "sanctions" specified by Rule 37 are largely remedial, rather than punitive. For example, the Rule permits an order that certain matters (that have been the subject of a disobeyed discovery order) "shall be taken as established." Rule 37(b)(2)(A). While the court also has the discretionary power under Rule 37 to impose monetary sanctions, as under Rule 11, that is precisely the situation in which wilfulness *vel non* presumably would be pertinent to the court's judgment as to whether such sanctions were appropriate.

¹³ In fact, we suggest that there is a substantial question whether Rule 11 should apply at all to the Lambe declaration in light of the specific provisions governing affidavits in Rule 56(g). While the Lambe declaration was submitted in support of a motion for an injunction rather than a motion for summary judgment, it would appear anomalous if Business Guides could be sanctioned for non-wilful misconduct based on that alone. *See* also note 3, *supra*.

considerations is consistent with the conclusion that Rule 11 should not be employed to sanction a client's good faith, albeit mistaken, beliefs or actions. Respondents appear to acknowledge the pertinence of these policies but argue that a good faith standard will not further them. Respondents' arguments, however, are premised upon a misunderstanding of both the purpose of the 1983 amendments to Rule 11 and the Rule's practical application.

First, respondents' brief ignores the fact that the primary focus of amended Rule 11 is the attorney, not the client. Indeed, but for the case below, virtually every case cited by respondents deals with the application of the Rule to attorneys. The Rule simply is not directed, in the first instance, at represented parties. See, e.g., American Judicature Society, *Rule 11 in Transition, The Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11* 30-31 (Burbank, Reporter 1989) (hereafter "Third Cir. Rpt.") (presumption that Rule will be applied to attorneys); Miller, *The New Certification Standard Under Rule 11*, 130 F.R.D. 479, 481 (1990). Here, that approach was turned on its head. Instead of directing the Rule 11 certification inquiry to counsel, the inquiry was misdirected to the client,¹⁴ which relied in good faith upon its counsel in proceeding with the contemplated infringement action. (J.A. 196-99)¹⁵

¹⁴ Respondents ostensibly withdrew their Rule 11 motion against the lawyers because the Finley Kumble law firm had filed for bankruptcy. (Pet. App. 28a) However, Rule 11 sanctions should have been imposed, if at all, upon the individual attorney who signed the offending complaint and TRO papers, not the firm. *Pavelic & LeFlore v. Marvel Entertainment Group*, ___ U.S. ___, 110 S. Ct. 456 (1989). As that attorney had not personally filed a bankruptcy petition, there was no procedural impediment to the consideration of Rule 11 sanctions against counsel.

¹⁵ Sanctioning Business Guides for the unknowing errors in Mr. Lambe's declaration presents an additional problem of fair notice. On its face, Mr. Lambe's declaration was executed under "penalty of perjury." Accordingly, Mr. Lambe was deemed to have notice that his declaration would be held to that standard. Mr. Lambe, however, had no notice that

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Second, respondents' argument that application of a good faith standard to represented parties but not to attorneys somehow will be more complicated, time consuming and invasive of the attorney-client relationship mistakes, once again, the proper province of the Rule. As we have stated, the certification requirement is imposed upon attorneys (and *pro se* parties), not clients. Thus, it is only in the unusual case (i.e., the presentation of knowingly false evidence or other knowingly wrongful conduct) where the client would be implicated. And, even under that scenario, the consideration of whether or not the client, in fact, acted in good faith certainly is no more complicated than consideration of whether the client acted in a manner objectively unreasonable in light of the myriad of factors which the Ninth Circuit test would deem relevant.¹⁶ Indeed, it is inevitably more complicated if two people or entities (lawyer and

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his declaration would be held to a "reasonable inquiry" standard under Rule 11. Indeed, as we have argued, the Rule provides no indication whatsoever as to when represented parties are subject to sanction. Cf. *Link v. Wabash Railroad*, 370 U.S. 626 (1962). While a party surely cannot complain that it had no fair notice that it must act in good faith, holding the client to a higher standard without notice is problematic and raises due process concerns. See, Third Cir. Rpt. at 32. The concern about fair notice in fact informed the advisory committee's decision to reject the suggestion that all sanctions provisions be merged into a single rule. The committee reasoned that for lawyers not "specializing in federal procedure or a member of a bar association committee devoted to federal practice," repetition and cross-referencing would provide valuable notice of the sanctions standards. Memorandum from Walter R. Mansfield to Members of the Advisory Committee on Civil Rules, *Analysis Of Comments Re: Committee's Proposed Amendments to Rules 7 and 11*, at para. 7 (dated December 21, 1981) (hereafter "Mansfield Memo") (on file at the National Archives). The same considerations would seem doubly true for laypersons, who can only be expected to conform to those requirements about which they have clear notice.

¹⁶ Respondents' argument that Business Guides' position creates an unworkable "double standard" (R.B. 20-22) is curious in light of respondents' (and the Ninth Circuit's) acknowledgement that the proffered objective standard itself would vary as between lawyer and client. (R.B. 24-25; Pet. App. 18a) The good faith test thus presents no more of a

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client), rather than one, are routinely required to defend against a sanction request. Not only do the extensive hearings held in this case demonstrate the point, so also does the extensive inquiry necessary to answer the questions relevant to the Court of Appeal's "sliding scale" version of the "objective" standard, which would require trial judges to consider "all appropriate and relevant variables." (R.B. 24) Petitioner submits that such involved proceedings are at least as likely as a "subjective test" to run afoul of this Court's recent admonition that Rule 11 "must be read in light of concerns that it will spawn satellite litigation" *Cooter & Gell v. Hartmarx Corp.*, ___ U.S. ___, 110 S. Ct. 2447, 2454 (1990).¹⁷

Respondents' arguments about the possible effect of a subjective standard upon the attorney-client privilege also are misdirected. It is the possibility of sanctioning the client under any standard that triggers the concern. Third Cir. Rpt. at pp. 41-43, 87-88.¹⁸ Indeed, it was this concern, among others, that

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double standard than would application of the objective standard and, moreover, comports both with the textual requirements of the Rule and with its underlying policies.

¹⁷ In fact, the advisory committee appears to be concerned about satellite litigation even in the context of application of the objective standard to attorneys. The advisory committee recently has issued a call for written comments on Rule 11. The call notes that, along with over 1000 reported decisions on Rule 11, "[t]here is a substantial literature on the subject" and that "[i]n light of all the comment, the Committee has resolved to invite written public comments on the operation of the sanctions rules." One question to which responses are invited is: "Has the financial cost in satellite litigation resulting from the imposition of sanctions perhaps exceeded the benefits resulting from any increased tendency of lawyers to 'stop and think?'" Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Call for Written Comments on Rule 11 of the Federal Rules of Civil Procedure and Related Rules 1-3* (August, 1990).

¹⁸ If anything, this concern is less significant under a bad faith test since the attorney-client relationship already has been compromised. As noted by the Third Circuit Task Force:

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prompted the Third Circuit Task Force to recommend a presumption that sanctions be imposed only on the lawyer. *Id.* at 30-31, 41-43, 88. Due to concerns about routinely invading the attorney-client relationship and privilege, the Task Force recommended that courts should "avoid, except in rare, egregious cases, inquiring about the relative responsibility of lawyer and client for a Rule 11 violation." *Id.* at 31.

D. RULE 11, AS INTERPRETED BY THE COURT BELOW, VIOLATES THE RULES ENABLING ACT

In light of respondents' essential disregard of the issue, we revisit the Rules Enabling Act only briefly. Respondent's sole rejoinder seems to be that because fee-shifting is not mandated by Rule 11, the teachings of *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975), are not pertinent. But petitioner did not suggest that the mandatory nature of the sanction is dispositive of the issue. See P.B. 40-48.¹⁹ Rather, it is the problem of a

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If the client has lied to the lawyer, the relationship has already been ruptured, and the costs of separate representation and an evidentiary hearing (when necessary) in the sanctioning process are unavoidable. If the problem is rather that the lawyer has been too lazy to investigate the client's story or unwilling to risk the loss of business, leaving the matter of re-allocation (if permitted) to the lawyer and client seems not only appropriate but, as a means to discourage the latter attitude, highly desirable. According to this view, re-allocation of a (monetary) sanction from the lawyer to the client should be forbidden when, as in most cases of inadequate legal inquiry, the lawyer's paramount responsibility is clear. Otherwise, except in rare and egregious cases, the court should not inquire.

Third Cir. Rpt. at p. 42.

¹⁹ Indeed, the court of appeals in *Alyeska* had held that fee-shifting was permissible (not mandatory) under a private attorney general concept. 421 U.S. at 245-46. This Court rejected that conclusion, holding that, absent statutory authority, fee-shifting (regardless of whether it is mandatory or discretionary) is impermissible as contrary to the American Rule. *Id.* at 247.

procedural rule being interpreted to alter substantive laws and to reallocate the burdens of litigation which creates the potential problem. As one commentator has stated in reference to amended Rule 11: "The fact is that, at least in recent years, the rulemakers have evidenced a shocking ignorance of, or disregard for, statutory law." Burbank, *Hold the Corks: A Comment on Paul Carrington's "Substance" and "Procedure" in the Rules Enabling Act*, 1989 Duke L.J. 1012, 1041. While imposing monetary sanctions upon counsel may be justified by the judiciary's plenary control over its officers (see *Theard v. United States*, 354 U.S. 278, 281 (1957); Wright and Miller, *Federal Practice and Procedure*, Civil 2d § 1332 (1990)), permitting such a sanction upon litigants in the absence of bad faith, goes beyond the courts' inherent powers (*Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765-66 (1980); *NASCO, Inc. v. Calcasieu Television and Radio, Inc.*, 894 F.2d 696 (5th Cir.), cert. granted sub nom., *Chambers v. NASCO, Inc.*, 1990 WL 119996 (Oct. 1, 1990)), and thus is not readily reconcilable with the limitations imposed by 28 U.S.C. § 2072 and a proper concern for separation of powers. This important problem may and should be avoided by a construction of the Rule which is consistent with the judiciary's inherent powers. Cf. *United States v. Clark*, 445 U.S. 23, 27 (1980).

III. CONCLUSION

For the foregoing reasons, and for the reasons stated in petitioner's opening brief, the decision below should be reversed.

Respectfully submitted,

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